SARAWAK SECURITIES SDN BHD

v.

GERARD DING SING DAC & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: 22-248-99-II]
28 JUNE 2000

CIVIL PROCEDURE: *Stay of proceedings - Application for - Whether special circumstances to warrant stay*

CIVIL PROCEDURE: *Action - Consolidation of actions - Application for - Common questions of law and fact - Rules of the High Court 1980, O. 4 r. 1(1) - Whether application allowed*

There were two applications herein. The 1st was the 3rd defendant's application for stay of all proceedings of the plaintiff's action against him and ten others in suit 248 until suit 234 filed by the 3rd defendant was disposed off. The 2nd application was the plaintiff's application to consolidate suit 234 with suit 248. In support of his application for stay, the 3rd defendant claimed that the final determination of the declaratory orders he sought for in suit 234 would directly affect the outcome of the plaintiff's claim against him in suit 248.

Held:

[1] The application for stay should be dismissed as the applicant had not shown any special circumstances in his affidavit in support of the application.

[2] Although suit 234 was filed earlier than suit 248, the burden of proof lay on the plaintiff against the ten defendants and the 3rd defendant. Thus, the plaintiff should be allowed to proceed first and the action brought by the 3rd defendant be stayed or tried together or the plaintiff's case followed by the 3rd defendant's case.

[3] As there were common questions of law and fact, the plaintiff satisfied O. 4 r. 1(1) Rules of the High Court 1980 for an order for consolidation. Also, if the actions were not consolidated, there would be a risk of inconsistent verdicts given in each of the two actions. Thus, the plaintiff's application for consolidation of the two suits should be allowed with suit 234 treated as a counterclaim in suit 248.

[Application for stay dismissed; application for consolidation allowed.]

Case(s) referred to:

Baring Futures (Singapore) Pte Ltd (in liquidation) v. Deloitte & Touche (a firm) & Anor [1997] 3 SLR 312 ***(refd)***

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***

Jong Chuk v. Chong Tung Sang & Ors [1999] 6 CLJ 574 ***(refd)***

Leong Chee Kong & Anor v. Tan Leng Kee [1999] 7 CLJ 492 ***(refd)***

Slaugh Estates Ltd v. Slaugh Borough Council & Anor [1967] 2 All ER 270 ***(refd)***

Thomson v. The South Eastern Railway Company; The South Eastern Railway Company v. Thomson [1882] 9 QBD 320 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 4 r. 1(1)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, p 442

Halsbury's Laws of England, 3rd edn, vol 16, p 35

Malaysian Court Practice, High Court

For the plaintiff - HC Sim; M/s Reddi & Co

For the 3rd defendant - Bong Ah Loi; M/s Bong & Co

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

There are two applications this morning, (encl. 14 & encl. 24); the former is the 3rd defendant's application for stay of all proceedings until the suit No. 22-234-99-III/II (the first suit) be disposed off, and the latter is the plaintiff's application to consolidate the two suits No. 22-234-99-III/II and No. 22-248-99 (the second suit).

Facts

The plaintiff's Suit no. 22-248-99-II dated on 1 December 1998 against 10 defendants (includes James Ling-the 3rd defendant). James Ling holds a Margin Account no. 881888 with the plaintiff. The 1st defendant is an employee of the plaintiff and the 2nd defendant is a remisier of the 3rd defendant. The 4th to 10th defendants have each a trading account with the plaintiff, and there are transactions between each of the defendants and the 3rd defendant. The 11th defendant has taken full responsibility for all the amount due under the trading account of the 6th defendant (the wife).

In this action, the 3rd defendant had served on the plaintiff his defence, to which the plaintiff had filed its reply thereto. As such, prayer (b) in the 3rd defendant's application is academic, and the only issue for the determination of the court is whether the application to stay all proceedings pending the determination of the 1st suit.

The summons-in-chambers dated 18 December 1999 (encl. 14), the 3rd defendant prayed that this action be stayed in so far as it affects him, until the trial of the first suit is disposed off on the ground of convenience, save time and costs. It would not cause any prejudice to the plaintiff.

In the affidavit in support of this application for stay, James Ling claims that "the final determination of the declaratory orders in Suit 234 would directly affect the outcome of Sarawak Securities's claims against James Ling in Suit 248, *ie*, Sarawak Securities's claims in Suit 248 would wholly fail if the declaratory orders in favour of James Ling is granted".

James Ling has not indicated in this application under what rule of court or whether under the inherent jurisdiction of the court that the application is made, this would render such an application liable to be struck off. I will reiterate what I said in *Jong Chuk v. Chong Tung Sang & Ors* [1999] 6 MLJ 160, at p. 163:

> The court's power to stay proceedings may be exercised under particular statutory provisions, or under the Rules of High Court, or under the court's inherent jurisdiction, or under one or all of three powers. The applicant had failed to state whether it was applying under a particular statutory provision, or under the Rules of High Court, or under the court's inherent jurisdiction, or under one or all of these powers. This failure makes the application liable to be struck off.

In the second suit, the Sarawak Securities (the plaintiff) is claiming against James Ling (the 3rd defendant) who is the margin account holder in respect of the transactions and/or activities thereunder; and the holder of James Ling's trading account in respect of the securities which were purchased/'picked up' from James Ling's trading account through the margin account. This means that a trading account is one where the holder thereof is entitled to any credit facilities or financing from Sarawak Securities in relation to the purchase of shares or securities, *ie*, the trading account holder has to pay for shares purchased through his trading account unless such shares/securities are 'picked up' or purchased by another party, in which case, the obligation to pay for such shares/securities are transferred to the other party, if payment for such shares has yet to be made.

In the first suit, James Ling is alleging that he had stopped trading under the Margin Account since May 1997, and as such he has no knowledge of any transactions and/or activities under the margin account thereafter. He had not received any statements or any other documents in respect of the margin account from May 1997. This is in fact the gist of the defence of James Ling in the second suit.

On a date or dates unknown to James Ling, before 30 April 1999 in breach of the terms of the margin account, the Sarawak Securites and Gerard Ding had wrongfully disposed off the said shares and converted them to their own use.

Halsbury's Laws of England, 4th edn, vol. 37, para. 442 states:

> The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

Halsbury's Laws of England, 3rd edn, vol. 16, p. 35, states:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule only grant it if there are special circumstances, it must be deposed to on an affidavit unless the application is made at the hearing.

See *Slaugh Estates Ltd v. Slaugh Borough Council & Anor* [1967] 2 All ER 270.

The applicant has not shown any special circumstances in his affidavit in support of this application, which will move the court to exercise its discretionary power. That being so, the court has no ground upon which to exerise its discretion. In the circumstances, I will dismiss the application with costs to the plaintiff.

Although the first suit (*ie*, No. 234) was filed by the 3rd defendant on 17 November 1999, earlier in time than the second suit (*ie*, No. 248) filed by the plaintiff on 1 December 1999, the burden of proof lay on the plaintiff against the ten defendants including the 3rd defendant, and in my view the plaintiff should be allowed to proceed first, and the action brought by the 3rd defendant be stayed or tried together or the plaintiff's case followed by the 3rd defendant's case.

In *Thomson v. The South Eastern Railway Company; The South Eastern Railway Company v. Thomson* [1882] 9 QBD 320, where in an action commenced on 28 November 1881, Thomson claimed a sum of money, being the balance of the price of a steamship built by them for the defendants, a railway company and some other sums as extras. The railway company in a cross action which was commenced on 30 November 1881 claimed as plaintiffs for a return of all moneys paid by them to Thomson on account of the steamship and damages. In the dispute between the parties, the burden of proof lay upon the railway company. The queen's bench division ordered that

the action of the railway company be stayed with liberty for the railway company to raise their claim by way of counterclaim in the action brought by Thomson on the ground that Thompson had been the first to commence legal proceedings.

On appeal, the Court of Appeal reversed the decision of the Queen's Bench Division, and held that as the burden of proof lay upon the railway company, the action brought by the railway company should be allowed to proceed and the action brought by Thomson should be stayed with Thomson being at liberty to raise all questions by counterclaim.

Brett LJ stated;

> I therefore to think that there is no hard and fast rule, in the case of cross actions, that the one which was commenced last must be the one to be stayed. I think that the judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties: ... If all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant although all the burden of proof lies upon him, and so to give his antagonist the power to anticipating him in matters which but for the order of the Court he could not do.

Holker LJ, in the same case stated that;

> ... it seems to me to be reasonable that the party to a litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and to have the control of the action.

Consolidation

The application (encl. 24) for consolidation of the two suits, Suit 234 and Suit 248, on the grounds that there are common questions of law and fact in both cases. The rights to relief claimed in both Suits arise out of the same series of transactions, and this would save time and costs.

The court may order consolidation under O. 4 r. 1 of the Rules of High Court 1980 if one of the those limbs thereunder is satisfied: that same common question of law and fact arises in the actions to be consolidated; or that the right relief claimed therein are in respect of or arise out of the same transaction or series of transaction; or that for some other reason it is desirable to make an order of consolidation.

It seems to me that the common questions of law and facts which arise in both Suit 234 and Suit 248, the plaintiff has satisfied the first limb of O. 4 r. 1(1) of the Rules of High Court 1980. It is clear on the facts that there are common questions of law and fact, one of which is whether James Ling is liable to the Sarawak Securities for the amount owing and the various transactions under the margin account held by him. In fact James Ling has in his affidavit in support of his application admitted "that there are common issues and evidence between Sarawak Securities and myself in both Suits (234 and 248). This is also repeated in the affidavits in reply."

In *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1979] 2 MLJ 244, the Federal Court in reversing the decision of the High Court held that the decision of the High Court in not allowing consolidation of the two actions were wrong as the parties were the same, the actions arose out of the same transactions and the question of law and fact were common to them. See also *Leong Chee Kong & Anor v. Tan Leng Kee* [1999] 7 CLJ 492.

The White Book states:

> The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common questions of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions 'to render it desirable that the whole should be diposed of at the same time' ... Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same, or where the plaintiffs or defendants or all are different.

Similarly, in *Malaysian Court Practice, High Court*, it is stated that;

> An order for consolidation may be made where the parties in the actions are the same persons or different persons.

If the actions are not consolidated, there would be a risk of inconsistent verdicts being given in each of the two actions in so far as James Ling's liability as the holder of the margin account.

> ... one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgments will come into existence if it not ordered

per Raja Azlan Shah FLJ (as His Majesty then was) in *Central Holdings Bhd.'s* case *(supra)*.

Lai Kew Chai judge in *Baring Futures (Singapore) Pte Ltd (in liquidation) v. Deloitte & Touche (a firm) & Anor* [1997] 3 SLR 312 said;

Only by bringing all the principal players together before one forum or adjudication could the responsibility be justly, sensibly and more sufficiently ascertained and distributed between those concerned. This approach would avoid the potential disaster of inconsistent verdicts which could be given if similar disputes with overlapping facts involving the same or different parties were litigated before two different courts in two different jurisdiction.

In the light of the foregoing, I would allow the plaintiff's application (encl. 24) for consolidation of the two suits, and Suit 234 being treated as a counterclaim in Suit 248.